No. 94-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VARITY CORPORATION,

Petitioner,

—v.—

CHARLES HOWE, ROBERT WELLS, RALPH W. THOMPSON, PATRICK MOUSEL, on Behalf of Themselves and as Representatives of a Class of Persons Similarly Situated, JOHN ALTOMARE, CHARLES BARRON, ALEXANDER CHARRON, CHARLOTTE CHILES, ANITA CROWE, RAY DARR, DORIS GUIDICESSI, BARNETT LUCAS, ROBERT SKROMME, and the Estate of WALTER SMITH, individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF

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September 22, 1995

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Petitioner Varity Corporation ("Varity") respectfully submits this opposition to respondents' motion for leave to file a supplemental brief that raises, for the first time in this proceeding, an amendment to ERISA enacted six years ago. In support of its opposition, Varity states as follows:

1. What plaintiffs seek to file is nothing more than an improper sur-reply brief, and the instant motion should be denied for that reason alone. Plaintiffs submitted their opposing brief on the merits on July 26, 1995. It did not so much as mention ERISA § 502(l), 29 U.S.C. § 1132(l) (Supp. V 1993), as amended. Varity timely submitted its reply on August 28, 1995. Now, plaintiffs wish to call to the Court's attention an argument they assert they "discovered" after they filed their brief on the merits in opposition, but which they also appear to have discovered only after Varity filed its reply.

Plaintiffs acknowledge that the statute upon which they seek to rely was enacted in 1989; they concede that their proposed brief does not contain any new material permitted to be included in a supplemental brief as contemplated by Rule 25.5 of the Rules of this Court.[1] Under those circumstances, the Rules do not contemplate additional briefing.

2. In any event, plaintiffs are wrong that § 502(l) constitutes a "clear and direct indication . . . of Congressional intent" (Resp. Supp. Br. 3-4) as to whether individuals may sue on their own behalf for breach of fiduciary duty. Section 502(l) was enacted in 1989, fifteen years after passage of ERISA—and thus fifteen years after passage of § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988), the provision at

[1] Under Rule 25.5, a party may file a supplemental brief prior to oral argument only to present "late authorities, newly enacted legislation, or other intervening matter that was not available in time to have been included in a brief". We are aware of no case in which the Court allowed a party to file a supplemental brief before argument in order to present information that could have been timely argued. However, in circumstances similar to those here, the Court denied leave. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 465 U.S. 1097 (1984) (order denying motion to present additional facts and legal argument where movant claimed that it had omitted new material from timely-filed merits brief on advice of printer, *see* Motion for Leave to File Supplemental Brief and Supplemental Brief of Respondent, Greenmoss Builders, Inc. in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18, filed Mar. 6, 1984 at 2).

issue in this case. At very most, § 502(l) reflects Congress' implicit understanding of a different provision—§ 502(a)(5), 29 U.S.C. § 1132(a)(5) (Supp. V 1993)—fifteen years after that provision was enacted. It has long since been clear that the opinion of a subsequent Congress as to the meaning of a provision of a statute—even the same provision, let alone a different one—is of "little assistance" in determining the meaning of an earlier passed statute. *Public Employees Retirement System* v. *Betts*, 492 U.S. 158, 168 (1989); *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958).

3. Finally, the adoption of § 502(l) has no bearing on this action. The new section did not amend § 502(a)(3); it did not even mention it.

Plaintiffs nonetheless assert that the language in § 502(l) referring to amounts paid to "a plan or its participants and beneficiaries" confirms that actions instituted under § 502(a)(5) (and thus, by analogy, § 502(a)(3)) for fiduciary violations may be brought for the benefit of particular individuals themselves as well as for plans. But plaintiffs' reading depends on a formalistic distinction that § 502(l) does not make. As plaintiffs would have it, the reference in § 502(l) to amounts ordered to be paid to a plan's "participants and beneficiaries" applies *only* to § 502(a)(5) actions and not to those brought by the Secretary under § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988)—even though § 502(l) refers to both subsections. Nothing in the language of § 502(l) permits that reading. That being so, the language referring to "its [the plan's] participants and beneficiaries" must be read to apply not only to amounts paid in § 502(a)(5) actions, but to amounts paid in § 502(a)(2) actions as well. Accordingly, because § 502(l) necessarily contemplates that a plan's "participants and beneficiaries" can recover "amounts" in actions brought under § 502(a)(2), which, as this Court held in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134

(1985), may *only* be brought on behalf of a plan, § 502(a)(5) can hardly be read to the contrary.[2]

For the foregoing reasons, this Court should deny respondents' motion for leave to file the supplemental brief.

Dated: New York, New York
September 22, 1995

Of Counsel:

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[2] In fact, the only reading of § 502(l) that is consistent with the plain language of §§ 404 and 409, 29 U.S.C. §§ 1104, 1109 (1988 & Supp. V 1993), as well as with this Court's decision in *Russell*, is that under § 502(a)(5), the Secretary may only sue for breach of fiduciary duty on behalf of a plan. Other portions of § 502(l) itself support that reading. *See* ERISA § 502(l)(3)(B), 29 U.S.C. § 1132(l)(3)(B) (Supp. V 1993), as amended (Secretary may waive or reduce penalty, *inter alia*, if it is reasonable to expect that defendant "will not be able *to restore all losses to the plan*") (emphasis added).